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No. 92-____

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

ALM CORPORATION,

*Petitioner,*

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Should a court reviewing an agency decision in an enforcement proceeding defer to the agency's broad interpretation of a penal, not regulatory, statute, or should it apply the rule of lenity and construe the statute strictly against the government.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**Docket No. 92-____**

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ALM CORPORATION,

*Petitioner,*[1]

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

The petitioner seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered on September 2, 1992, affirming the final decision of the Administrator of the United States Environmental Protection Agency rendered October 11, 1991 against the petitioner.

## OPINIONS BELOW

The decision and judgment of the United States Court of Appeals for the Third Circuit in *ALM Corporation v. United States*, 974 F.2d 380 (3d Cir. 1992) is reproduced in the

1 There are no corporate relationships to be identified pursuant to Rule 28.1.

Appendix at 1a. The decisions of the United States Environmental Protection Agency which were the subject of the appeal are reproduced in the Appendix at 18a, 28a, and 35a.

## JURISDICTION

The Court has jurisdiction to review this case by writ of *certiorari* pursuant to 28 U.S.C. section 1254(1). The judgment of the Third Circuit was entered on September 2, 1992. The Third Circuit's jurisdiction was predicated upon section 16(a)(3) of the Toxic Substances Control Act, 15 U.S.C. section 2615(a)(3).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 13 of the Toxic Substances Control Act, 15 U.S.C. section 2612:

**§ 2612. Entry into customs territory of the United States.**

**(a) In general.—(1)** The Secretary of the Treasury shall refuse entry into the customs territory of the United States (as defined in general headnote 2 to the Tariff Schedules of the United States) of any chemical substance, mixture, or article containing a chemical substance or mixture offered for such entry if—

(A) it fails to comply with any rule in effect under this chapter, or

(B) it is offered for entry in violation of section 2604 or 2605 of this title, a rule or order under section 2604 or 2605 of this title, or an order issued in a civil action brought under section 2604 or 2606 of this title.

(2) If a chemical substance, mixture, or article is refused entry under paragraph (1), the Secretary of the Treasury shall

notify the consignee of such entry refusal, shall not release it to the consignee, and shall cause its disposal or storage (under such rules as the Secretary of the Treasury may prescribe) if it has not been exported by the consignee within 90 days from the date of receipt of notice of such refusal, except that the Secretary of the Treasury may, pending a review by the Administrator of the entry refusal, release to the consignee such substance, mixture, or article on execution of bond for the amount of the full invoice of such substance, mixture, or article (as such value is set forth in the customs entry), together with the duty thereon. On failure to return such substance, mixture, or article for any cause to the custody of the Secretary of the Treasury when demanded, such consignee shall be liable to the United States for liquidated damages equal to the full amount of such bond. All charges for storage, cartage, and labor on and for disposal of substances, mixtures, or articles which are refused entry or release under this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future entry made by such owner or consignee.

**(b) Rules.**—The Secretary of the Treasury, after consultation with the Administrator, shall issue rules for the administration of subsection (a) of this section.

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Section 15 of the Toxic Substances Control Act, 15 U.S.C. section 2614:

**§ 2614. Prohibited acts**

It shall be unlawful for any person to—

* * *

(3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this chapter or a rule thereunder; or

* * *

---

Section 16 of the Toxic Substances Control Act, 15 U.S.C. section 2615:

**§ 2615. Penalties**

(a) Civil.—(1) Any person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title.

* * *

---

Section 12.118 of the Customs Regulations, 19 C.F.R. section 12.118:

**§ 12.118 Toxic Substances Control Act.**

The importation into the customs territory of the United States of a chemical substance in bulk or as part of a mixture, or article *containing a chemical substance or mixture*, is governed by the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2601 *et seq.*), and by regulations issued under the authority of section 13(b), TSCA (15 U.S.C. 2612(b)) by the Secretary of the Treasury in consultation with the Administrator, Environmental Protection Agency ("EPA").

---

Section 12.121 of the Customs Regulations, 19 C.F.R. section 12.121:

**§ 12.121 Reporting Requirements.**

(a) *All chemical substances in bulk or mixtures.* The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA. The importer, or his authorized agent, shall sign one of the following statements:

I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.

I certify that all chemicals in this shipment are not subject to TSCA.

The certification, which shall be filed with the district director at the port of entry before release of the shipment may appear as a typed or stamped statement:

* * *

---

Section 12.122 of the Customs Regulations, 19 C.F.R. section 12.122:

**§ 12.122 Detention of certain shipments.**

* * *

(b) The district director at the port of entry shall detain shipments of chemical substances, mixtures, or articles at the importer's risk and expense, in the following situations:

* * *

(3) Whenever the importer fails to certify compliance with TSCA as required by § 12.121.

(c) Upon detention of a shipment, the district director shall give prompt notice to the Administrator and the importer. The notice shall include the reasons for detention.

(d) A detained shipment shall not be held in the custody of the district director for more than 48 hours after the date of detention. Thereafter, the shipment shall be promptly turned over to the Administrator for storage or disposition as provided for in §§ 12.127 and 127.28(i), unless previously released to the importer under bond as provided in § 12.123(b). Notice of

intent to abandon the shipment by the importer shall constitute a waiver of all time periods specified in parts 12 and 127.

---

Section 12.123 of the Customs Regulations, 19 C.F.R. section 12.123:

**§ 12.123 Procedure after detention.**

(a) *Submission of written documentation.* If a shipment is detained by a district director under § 12.122, the importer may submit written documentation to the Administrator with a copy to the district director within 20 days from the date of notice of detention, to show cause why the shipment should not be refused entry. If an importer submits that documentation, the Administrator shall allow or deny entry of the shipment within 10 days of receipt of the documentation, and in any case shall allow or deny entry of the shipment within 30 days of the date of notice of detention.

(b) *Release under Bond.* The district director may release to the importer a shipment detained for any of the reasons given in § 12.122 when the district director has reasonable grounds to believe that the shipment may be brought into compliance, or when the district director deems it appropriate under § 141.66 of this chapter. Any such release shall be conditioned upon furnishing a bond on Customs Form 7551, 7553, or 7595 for the return of the shipment to Customs custody. The bond shall be for the full amount required in § 113.14 of this chapter.[2] If a shipment or chemical substance, mixture, or article is released to the importer under bond, the shipment shall be held intact and shall not be used or otherwise disposed of until the Administrator makes a final determination on entry as provided for in paragraph (c) of this section.

(c) *Determination by the Administrator.* After consideration of the available evidence and within 30 days from the notice of detention, the Administrator shall notify the district director

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2 19 C.F.R. § 113.14 (1985) was amended to combine the indicated bond forms into one C.F. 301. See 19 C.F.R. § 113.11 (1986).

and the importer of his decision either to permit or refuse entry of the shipment. If the Administrator finds that the shipment is in compliance with TSCA, the district director shall release the shipment to the importer. If the Administrator finds that the shipment is not in compliance, the *district director shall:*

(1) Refuse delivery to the importer, giving reasons for such refusal, or

(2) If the shipment has been released on bond, demand its redelivery under the terms of the bond, giving reasons for such demand. If the merchandise is not redelivered within 30 days from the date of the redelivery notice, the district director shall assess liquidated damages in the full amount of the bond.

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Section 141.66 of the Customs Regulations, 19 C.F.R. section 141.66:

**§ 141.66 Bond for missing documents.**

Unless otherwise prescribed in these regulations, a bond on Customs Form 301, containing the bond conditions set forth in section 113.62 or section 113.69 of this chapter, as appropriate, may be given for the production of any required document which is not available at the time of entry. (See § 141.91 for the procedure applicable to incomplete or missing invoices.)

* * *

## STATEMENT OF THE CASE

The petitioner, ALM Corporation ("ALM"), imported seven shipments of nylon and other plastic material for use in the manufacture of various consumer goods such as plumbing fixtures and kitchen utensils. (3a). The material was entered at the port of New York and released by Customs. The entry documents did not include a certification stating that the shipment complied with the Toxic Substances Control Act ("TSCA"), or that TSCA did not apply, as required by the Customs regulations, 19 C.F.R. sections 12.118 *et seq.*, implementing section

13 of TSCA which governs imports. Subsequently, ALM entered two additional shipments with certificates stating that the material was not subject to TSCA. In fact, the material did comply with TSCA and was certifiable as such. (6a, 20a).

Customs neither detained nor demanded redelivery of any of the shipments in accordance with section 13 of TSCA and the regulations. 15 U.S.C. section 2612, 19 C.F.R. section 12.122. Instead, the United States Environmental Protection Agency ("EPA") commenced an enforcement proceeding claiming that ALM had violated section 15 of TSCA which makes it unlawful, *inter alia*, to fail to "submit reports, notices, or other information . . . required by [TSCA] or a rule thereunder," and was therefore liable for civil penalties as prescribed by section 16 of TSCA. The penalty claim was $6,000 per entry for a total of $54,000. ALM moved to dismiss on several grounds and asserted that the exclusive sanctions for the failure to file a compliance certificate at entry are detention by or redelivery of the goods upon demand to Customs, or the assessment of liquidated damages under the importer's Customs surety performance bond for failure to redeliver.[3] The administrative law judge denied the motion and held that a failure to file the certification required by the Customs regulations constitutes a failure to report within the meaning of section 15 of TSCA. (35a).

After a hearing, the judge assessed a penalty of $19,500. (28a). ALM appealed to the Administrator arguing that a failure to certify compliance at entry does not constitute a failure to report under TSCA, and that the omission at the time of entry is not a violation in any event because the Customs regulations expressly allow an importer to cure the oversight, a right not afforded to ALM. The Administrator issued a final decision affirming the judge's initial decision. (18a). ALM

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3 Customs bonds are required for all entries of imported merchandise. 19 U.S.C. § 1623; 19 C.F.R. § 142.4. Redelivery upon Customs demand is a bond term and a failure to comply constitutes a breach subjecting the importer to liquidated damages. 19 C.F.R. §§ 113.62, 172.0 *et seq*.

appealed to the United States Court of Appeals for the Third Circuit.

On appeal, ALM maintained that it had not violated section 15 of TSCA because the compliance certificates required to be filed with the entry documents under the Customs regulations were not "reports, notices or other information" within the meaning of the statute since those terms refer to submissions to be made to the EPA under other sections of TSCA or that agency's implementing regulations in 40 C.F.R. Part 700.[4] ALM urged the court not to defer to the EPA's interpretation of section 15 of TSCA since it is a penal provision which should be strictly construed against the government. Moreover, ALM argued that it did not violate the Customs regulations since those regulations state that any required document not available at entry may be subject to the importer's bond for its later production, 19 C.F.R. section 141.66, reproduced *supra*, and that Customs' TSCA regulations themselves authorize an importer to submit documents after entry to show cause why a shipment should not be detained or ordered redelivered, 19 C.F.R. section 12.123(a), reproduced *supra*. Both section 13 of TSCA and the Customs regulations specifically require redelivery to Customs custody for exportation or other disposition, or the assessment of liquidated damages under the importer's bond for failure to redeliver. 15 U.S.C. section 2612, 19 C.F.R. section 123(c). In this case, since there had been no redelivery order to violate, the bond was never breached and, perforce, no liquidated damages were ever assessed.

The Third Circuit denied ALM's petition and, citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) among other decisions, deferred to the EPA's interpretation of section 15 of TSCA stating:

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4 An EPA TSCA section 13 policy statement codified at Part 707 of the EPA regulations suggests that agency's awareness of the distinction between section 13 compliance and an importer's obligations under other sections of TSCA such as section 8 which concerns reporting and recordkeeping. 40 C.F.R. § 707.20.

> While other interpretations may be possible, EPA's interpretation of TSCA section 2614 is a permissible construction which this Court will uphold. *See National R. R. Passenger Corp.*, 112 S.Ct. at 1401-02. We therefore hold that EPA's interpretation of section 2614(3)(B) is a reasonable one and that section 2614(3)(B)'s reporting requirement includes the certifications required by 19 C.F.R. section 12.121.

974 F.2d at 393 (12a). The court went on to state that the compliance certificate regulation requires "self-monitoring" by importers because of Customs inability to physically search each shipment,[5] and that this goal would be defeated if importers were permitted to rectify an omission by "belatedly" submitting a certificate without penalty.[6] (14a). The court concluded, "EPA's interpretation of its statutory power to enforce TSCA, though broad, is not unreasonable." (15a).

## REASONS FOR GRANTING THE WRIT

> The Court Should Resolve Whether the Judicial Deference Doctrine as Formulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) With Respect To Agency Interpretation of Regulatory Statutes Should Apply to Penal Statutes Contrary To the Rule That Such Statutes are Strictly Construed Against the Government.

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5 This observation reflects a post hoc rationalization. Physical inspection is immaterial since whether an import is subject to TSCA is evident from the description of the merchandise on the required Customs entry documents such as the commercial invoice. 19 C.F.R. Part 141 Subpart F.

6 The court ignored the Customs regulations which expressly authorize bonding for the production of documents missing at entry. 19 C.F.R. §§ 12.122 and 141.66. Moreover, liquidated damages for failure to redeliver upon demand as required by the importer's Customs bond are penal in nature and sanction a failure to comply.

Although admitting that section 15 of TSCA was subject to various possible interpretations, the court deferred to the EPA's broad interpretation on the authority of *National R. R. Passenger Corp. v. Boston and Maine Corp.*, ____ U.S. ____, 112 S.Ct. 1394 (1992), and its progenitors. (7a, 12a). Actually, this Court formulated the principle in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) which has been described as a restatement of the judicial deference doctrine.[7] *Chevron* established an analytical model for determining when a court should defer to an agency's construction of a statute which it administers. If a regulatory statute admits of some ambiguity and there is no intrinsic or extrinsic evidence of congressional intent, a court should defer to the agency's interpretation if it is not unreasonable. In later decisions, the court refined and focused the analysis. *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *National R. R. Passenger Corp., Supra*, and cases cited. The characteristic common to the statutes involved in those decisions is that they were regulatory in nature. None involved either penal or revenue statutes whose interpretations are governed by different norms.

In a comprehensive exposition of the judicial deference doctrine, one commentator recognized the distinction between regulatory and other statutes:

> By its very extremism, the *Chevron/Young* articulation of deference underscores a critical point: the choice of interpretive model is ultimately a choice about allocating power, the power that results from ambiguity. When Congress has failed to speak clearly or comprehensively, who gets to decide what the law is? If a *non-regulatory* statute [54] is obscure or silent on a dispositive issue, the court proceeds to construct legal meaning out of whatever the enactors did supply. Although we continually debate how this process of meaning elaboration ought to occur,[55] we rarely question the appropriateness of the judiciary

7 Gerwin, *The Deference Dilemma: Judicial Responses to the Great Legislative Power Giveaway*, 14 Hastings Const. L.Q. 289 (1987).

> undertaking it—perhaps because no other option readily exists.[56] When a *regulatory* statute is ambiguous, however, the agency stands as a potential alternative recipient of the power inevitably created by the legislature's finite capacity for prescience and precision in expression. The rigid, literalistic approach *Chevron* and *Young* adopt towards whether Congress has expressed a judicially cognizable "intent" simply increases the quantum of power at stake in the selection of interpretative model. (emphasis the author's) (footnotes omitted)

Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L.Rev. 452, 464 (1989). Accordingly, there are non-regulatory statutes which courts are called upon to interpret outside the *Chevron* model. The case in question involves not legislative rules or a case-by-case interpretation to fill substantive gaps, but rather the meaning of terms in the penal provision of the statute.

A treatise writer summarized the rules regarding the construction of penal statutes as follows:

> It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.[2] The United States Supreme Court has adopted the "rule of lenity" as a corollary of the rule of statutory construction that requires penal statutes to be construed strictly against the power.[3] This rule rests on the fear that expansive judicial interpretations will create penalties not originally intended by the legislature.[4] The rule of lenity should only be applied if after reviewing all sources of legislative intent the statute still remains ambiguous.[5]
>
> * * *
>
> Strict construction is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions [sic

> which] would expose them to liability for penalties and what the penalties would be.
>
> * * *
>
> The "fair warning" rationale is used most often in connection with statutes applying punitive sanctions for conduct which is not *malum in se*. (Citations omitted)

*Sutherland Stat Const* section 59.03 (4th Ed.). Decisions of the Supreme Court so construing penal statutes are legion. E.g., *Commissioner v. Acker*, 361 U.S. 87 (1959); *United States v. Wiltberger*, 5 Wheat. 76 (1820). The appellate court in this case ignored the principle and deferred to an agency's interpretation of the penal provision of a statute in an enforcement proceeding brought by that agency itself. The court's decision was unsupported by the precedent it cited or by a fair application of any Supreme Court decision which rested upon judicial deference.

The judicial deference doctrine has been applied by the Supreme Court to regulatory statutes only. However, the appellate court's decision would extend the doctrine to penal statutes contrary to well established precedent. In comparable circumstances involving the interpretation of a revenue statute, the Federal Circuit similarly applied the *Chevron* deference principle to the interpretation of the appraisement provisions of the Tariff Act. *Generra Sportswear Co. v. United States*, 8 Fed. Cir. (T)____, 905 F.2d 377 (1990).[8] There is a danger that these precedents would engender the misapplication of the judicial deference principle to non-regulatory statutes as never intended by this Court. Therefore, the petitioner urges the Court to review the issue so that the development of the judicial deference doctrine can be properly contoured.

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8 Revenue statutes are strictly construed against the government, *Gould v. Gould*, 245 U.S. 151 (1917) citing *American Net & Twine Co. v. Worthington*, 141 U.S. 468 (1891) which involved tariff classification. *See, Sutherland Stat Const* § 66.01.

## CONCLUSION

For the foregoing special and important reason, the petitioner submits that the Court should entertain argument, or order a summary disposition on the merits, concerning application of the rule in *Chevron Co. U.S.A., Inc. v. Natural Resources Defense Council, supra,* to a penal statute contrary to the rule of lenity.

Respectfully submitted,

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November 30, 1992

# APPENDIX

Filed September 2, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 91-3785

---

ALM CORPORATION,
Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II,
Respondent

---

Appeal from the Decision of the
Environmental Protection Agency

---

Argued: June 25, 1992

PRESENT: BECKER, HUTCHINSON and ALITO,
*Circuit Judges*

(Filed September 2, 1992)

---

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---

**OPINION OF THE COURT**

---

HUTCHINSON, *Circuit Judge*.

I.

Petitioner, ALM Corporation (ALM), asks us to review an order of the Administrator of the United States Environmental Protection Agency (EPA). The EPA's order affirmed an Administrative Law Judge's (ALJ's) assessment of fines in the amount of $19,500.00 against ALM for violations of the

Toxic Substances Control Act (TSCA), 15 U.S.C.A. §§ 2601-2629 (West 1982 & Supp. 1992). ALM argues that the Administrator and the ALJ abused their discretion because (1) the certification documents required by 19 C.F.R. § 12.121 are not "reports, notices, or other information" ALM must submit under 15 U.S.C.A. § 2614(3)(B); (2) the Customs Service's regulatory detainment and enforcement procedures preclude EPA from separately enforcing those requirements under 15 U.S.C.A. § 2614(3)(B); and (3) ALM had the right to avoid the civil penalties by belatedly submitting accurate certification documents after EPA discovered ALM's violations. For the reasons stated below, we will deny the petition.

II.

The underlying facts are not in dispute. During late 1985 and early 1986, ALM imported nine shipments of nylon and other plastic pellets, described on the invoices as nylon 6.6 chips polynil P-50 and delrin 100/107. These shipments entered the United States at the port of New York. The pellets are used for injection molding various consumer goods, including plumbing fixtures and kitchen utensils. The first shipment of pellets imported on October 10, 1985 by ALM was not accompanied by a certification stating either that the shipment complied with TSCA or that TSCA did not apply to the shipment. This certification is required by 19 C.F.R. § 12.121(a).[1] After learning

1. The text of this section was the same in both 1985 and 1986, the years ALM was allegedly in non-compliance. *Compare* 19 C.F.R. § 12.121(a) (1985) with 19 C.F.R. § 12.121(a) (1986). It remains unchanged. *See* 19 C.F.R. § 12.121(a) (1992).

of the lack of certification, EPA issued a notice of noncompliance to ALM on November 26, 1985. During the first five months of 1986, ALM imported six more shipments of pellets without the certification required by 19 C.F.R. § 12.121(a). The Customs Service did not detain any of the shipments for lack of certification nor demand redelivery of the shipments because of noncompliance.

On June 23, 1986, EPA issued a Complaint, Compliance Order and Notice of Opportunity for Hearing to ALM. This initial complaint alleged that ALM had committed two violations of the reporting requirements of 19 C.F.R. § 12.121. After receiving EPA's complaint, ALM imported two more shipments of pellets in August of 1986, this time accompanied by certifications incorrectly stating that the shipments were not subject to TSCA. EPA subsequently amended the complaint to include all nine of ALM's shipments. The amended complaint alleged that ALM had violated 15 U.S.C.A. § 2614 when it imported nine shipments of a "chemical substance," as that term was defined by 15 U.S.C.A. § 2602 and 40 C.F.R. § 710.2(h), without proper certification that each shipment complied with TSCA, and that ALM had imported two shipments falsely certifying that they were not subject to TSCA. The amended complaint proposed a penalty of $6,000.00 for each of the nine violations, resulting in a total proposed penalty of $54,000.00.

ALM denied having committed any violations, requested a hearing and moved to dismiss the complaint on the following grounds: (1) EPA is not authorized to enforce customs regulations; (2) the exclusive sanctions for failure to certify are refusal

of entry and liquidated damages under the importer's surety bond; and (3) the pellets were not chemical substances within the meaning of TSCA. The EPA cross-moved for accelerated disposition on the question of ALM's liability.[2]

On November 30, 1989, the ALJ issued an order granting EPA's motion on the issue of liability based on her conclusions that the pellets were chemical substances subject to TSCA, that ALM's failure to file proper certifications as required by 19 C.F.R. § 12.121(a) constituted a failure to report within the meaning of 15 U.S.C.A. § 2614(3)(B), that civil penalties were assessable under 15 U.S.C.A. § 2615 and that EPA had enforcement authority under TSCA.

Since the parties were unable to agree on the amount of the penalty, the ALJ held an evidentiary hearing on May 2, 1990 to determine the amount of penalties that should be assessed. On August 30, 1990, the ALJ issued an initial decision assessing the penalty at $2,500.00 for each of the seven entries unaccompanied by certification, and $1,000.00 for each of the two entries accompanied by false certifications that the imported materials were not subject to TSCA, resulting in a total penalty of $19,500.00.

ALM appealed the ALJ's decision to the Administrator on two of the grounds advanced in its original motion to dismiss: (1) that failure to certify compliance with TSCA in a customs entry

2. Accelerated disposition in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation of Suspension of Permits, *see* 40 C.F.R. § 22.20 (1991), is comparable to a motion for summary judgment or, as in this matter, partial summary judgment.

does not constitute a failure to report under TSCA sections 2614 and 2615, and (2) that EPA is without authority to administer the governing customs regulations. In addition, ALM argued that its failure to submit certifications at entry was not an actionable violation of the customs regulations because it had not been afforded an opportunity to cure the defect, as the custom regulations allow, by belatedly filing a certification, especially in light of the fact that the importation of materials did not in and of itself violate TSCA.

On October 11, 1991, the Administrator issued a final decision and order affirming the ALJ's initial decision. ALM timely filed a petition for review of the Administrator's final order with this Court.

III.

The Administrator had jurisdiction to assess TSCA penalties against ALM pursuant to 15 U.S.C.A. § 2615(a)(2), and to delegate the hearing and initial determination of the EPA's complaint against ALM to an ALJ pursuant to 40 C.F.R § 22.04 (1991). We have jurisdiction to hear this petition for review of the final decision and order of the Administrator pursuant to 15 U.S.C.A. § 2615(a)(3), since petitioner ALM resides and transacts business within the Third Circuit.

The standard of review is set out in 5 U.S.C.A. § 706(2) (West 1977). Under that section, agency action may be set aside where it is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Id.* § 706(2)(A); *see Department of Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1986). Judicial review under this standard

is particularly deferential to the agency's interpretation of a statute it administers:

> Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law.
>
> . . . [Our prior] decisions mandate that when a court is reviewing an agency decision based on a statutory interpretation, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole. If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.

*National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992) (citations omitted). Deference is required whether an agency is interpreting the statute directly in an enforcement proceeding or through a rule or regulation promulgated thereunder. *See, e.g., id.* (deference given to Interstate Commerce Commission's interpretation of Rail Passenger Service Act); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (deference given in part to Customs Service's regulation implementing and interpreting Tariff Act of 1930); *Air Courier Conf. of*

*America/Int'l Comm. v. United States Postal Service*, 959 F.2d 1213, 1223 (3d Cir. 1992) (court's holding strengthened by deference to Postal Service's long-standing interpretation of Postal Reorganization Act).

IV.

A brief review of TSCA and the relevant federal regulations is helpful. TSCA was enacted in 1976 to regulate and provide for federal oversight of the manufacture, processing, distribution, use and disposal of chemical substances and mixtures. *See* 15 U.S.C.A. § 2601. TSCA defines the term "manufacture" to include "import into the customs territory of the United States." *Id.* § 2602(7). Thus, requirements imposed on domestic manufacturers under TSCA, are imposed on importers as well. Section 2614 of TSCA, which lists the acts prohibited under TSCA, makes it unlawful for any person to "fail or refuse to . . . submit reports, notices, or other information . . . as required by [TSCA] or a rule thereunder." *Id.* § 2614(3)(B). Section 2615 of TSCA provides that "[a]ny person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." *Id.* § 2615(a)(1) (in relevant part). Section 2615 further provides that EPA may assess civil penalties for a violation of section 2614 in an administrative order. *Id.* § 2615(a)(2)(A). The Secretary of the Treasury (Secretary) is empowered to refuse entry into the United States of "any chemical substance, mixture, or article containing a chemical substance or mixture" if it fails to comply with TSCA or any rule under TSCA. *Id.* § 2612(a)(1). The Secretary, in consultation with

the Administrator, is authorized to issue regulations to administer the powers granted in 15 U.S.C.A. § 2612. *Id.* § 2612(b).

Pursuant to that authority, the Secretary, through the Customs Service, promulgated 19 C.F.R. §§ 12.118 through 12.127. Section 12.121 provides, in pertinent part:

> § 12.121 Reporting requirements.
>
> (a) All chemical substances in bulk or mixtures. The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA. The importer, or his authorized agent, shall sign . . . [the] statement of certification]. . . .
>
> . . .
>
> (b) Chemical substance or mixture as part of articles. Each importer of a chemical substance or mixture as part of an article shall meet the reporting requirements set forth in paragraph (a) of this section only if required by a rule or order under TSCA.

19 C.F.R. § 12.121(a), (b). This section requires an importer of a chemical substance to certify to the Customs Service either that each shipment complies with TSCA and all applicable rules and orders issued under TSCA, or that the shipment is not subject to TSCA. *Id.* § 12.121(a).[3] Thus, in

3. Subsection (a) of the regulation covers generally all chemical substances, including the nylon pellets that are the

order to comply with 19 C.F.R. § 12.121(a), an importer of chemical substances must provide a certification with each shipment. *Id.* These certifications must be signed by the importer or an authorized agent and must be filed with the Customs Service's district director at the port of entry of the shipment. *Id.*

V.

The first issue we address is whether the EPA reasonably interpreted TSCA in concluding that the certification documents required by 19 C.F.R. § 12.121(a) are "reports, notices or other information" within the meaning of 15 U.S.C.A. § 2614(3)(B). Under subsection 2614(3)(B), a failure to submit any "reports, notices or other information" required by any TSCA rule is a prohibited act subject to penalties. 15 U.S.C.A. §§ 2614(3)(B), 2615. The ALJ concluded that certifications under 19 C.F.R. § 12.121 fall within the plain meaning of the phrase "reports, notices or other information."

On appeal, ALM argues that even though it did not submit the certification required by 19 C.F.R. § 12.121 for seven of the nine shipments and did not submit truthful certifications for the other two shipments, it did not violate section 2614(3)(B) because the required certification is not a "report, notice or other information" within the meaning of that section. In support of this argument, ALM points out that the term "report" is not defined

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subject of this proceeding. Subsection (b) would eliminate articles containing nylon, *e.g.*, fabrics, from the regulation's reporting requirements unless reporting was required by specific rule or order.

under either TSCA or EPA regulations, and that a certification is simply a statement that the shipment complies with TSCA, and does not include any "information." ALM also argues that EPA's own policy statements indicate that individual chemical shipments are not subject to TSCA reporting requirements, but are rather subject to customs reporting requirements. Finally, ALM argues that we are not bound to defer to EPA's interpretation of the regulatory statute it is charged with administering because we are reviewing a customs regulation which is enforced not by EPA but rather by the Customs Service.

EPA says common sense dictates that an item required by a section entitled "Reporting Requirements" is a "report." EPA also argues that the certifications required by 19 C.F.R. § 12.121 provide information because they state that each chemical substance is being imported in compliance with TSCA and that the importer is not offering for entry a chemical substance in violation of TSCA. Finally, EPA asserts that a comparison of subsection (3) of 15 U.S.C.A. § 2614 with section 2614's other subsections demonstrates that Congress intended "reports, notices or other information" to have a broad meaning. EPA points out that these other subsections are limited in the scope of their coverage because they each apply only to specific sections of TSCA. *See* 15 U.S.C.A. §§ 2614(1), 2614(2), 2614(4). On the other hand, subsection 2614(3) is not limited in scope to any particular portion of TSCA, but instead contains a general prohibition against, *inter alia*, failing to submit any "reports, notices or other information" required by "this chapter or a rule thereunder." *Id.* § 2614(3). As discussed *supra*, 19 C.F.R. § 12.121

is a "rule thereunder" because it was promulgated pursuant to 15 U.S.C.A. § 2612(b). While other interpretations may be possible, EPA's interpretation of TSCA section 2614 is a permissible construction which this Court will uphold. *See National R.R. Passenger Corp.*, 112 S. Ct. at 1401-02. We therefore hold that EPA's interpretation of section 2614(3)(B) is a reasonable one and that section 2614(3)(B)'s reporting requirement includes the certifications required by 19 C.F.R. § 12.121.

VI.

We next address ALM's argument that EPA had no authority to enforce 19 C.F.R. §§ 12.121 through 12.127 because they set forth Customs Service's detainment procedures subject to enforcement by the Customs Service. ALM correctly states that the Customs Service may detain shipments that do not comply with the certification requirements of 19 C.F.R. § 12.121. This does not mean, however, that EPA has no authority to impose civil penalties upon violators of TSCA section 2614. *See* 15 U.S.C.A. § 2601(c) ("It is the intent of Congress that the Administrator [of EPA] shall carry out this Chapter [TSCA] in a reasonable and prudent manner."). Although 19 C.F.R. § 12.122(b)(3) provides that the Customs Service will detain shipments that fail to have the proper certification, and 19 C.F.R. § 12.123 describes the post-detention procedure, neither states that detention by Customs is the exclusive enforcement procedure for violations of the certification requirement in 19 C.F.R. § 12.121.

EPA has always interpreted the TSCA penalty provisions and the Customs Service's detainment

procedures as co-existing, independent enforcement mechanisms. Its reasoning is pragmatic. It is at least impractical and perhaps impossible for the Customs Service to identify every non-complying shipment at the port because of the large volume of imports and the inefficiency and inconvenience of physical searches of every import by Customs Service officials or importers. The certification requirements are a form of self-policing. When violations may not be discovered until after entry, as is the case here, a post-entry procedure for penalizing violators is necessary. If we or the EPA were to conclude that the Customs Service's detainment procedures were the exclusive means of enforcing the certification requirements, violating importers would not be subject to civil penalties; such an interpretation is contrary to TSCA's purpose. EPA's consistent interpretation of TSCA to permit mutually supportive co-existence and interdependence between Customs Service and EPA enforcement procedures is shown by the following EPA policy statement, issued when the Customs Service's detention procedures were published as a proposed rule in 1980:

> Section [2615] of TSCA describes civil penalties and criminal penalties to be invoked in proper cases. . . . If an imported shipment does not comply with the Act, EPA will seek appropriate remedies under TSCA against persons responsible for the violations. These sanctions are in addition to those which may independently be prescribed for violation of the [Customs Service's regulations].

45 Fed. Reg. 79726 (1980). In addition, 19 C.F.R. § 12.118 provides:

> The importation into the customs territory of the United States of a chemical substance in bulk or as part of a mixture, or article *containing a chemical substance or mixture*, is governed by [TSCA] and by regulations issued under the authority of . . . TSCA (15 U.S.C. § 2612(b)) by the Secretary of the Treasury in consultation with the Administrator . . . .

19 C.F.R. § 12.118 (1986). We hold that EPA reasonably interprets the TSCA and its regulations as giving EPA the authority to impose TSCA civil penalties under section 2615 for failure to certify a shipment as required by 19 C.F.R. § 12.121, even though that shipment was also subject to the Custom Service's detainment procedures. Therefore, ALM cannot succeed in its petition for review on this particular ground.

Additionally, ALM argues that its violations were harmless, since the materials it imported in the violating shipments actually did comply with TSCA, and that if the Customs Service had "done its job," ALM could have been alerted to the need for submitting its certification and therefore complying with TSCA. The main purpose of the reporting requirements of section 2614 of TSCA is ensuring compliance with import restrictions. In order to achieve that goal, federal regulations require self-monitoring by importers. *See* 19 C.F.R. pt. 12. ALM failed to monitor itself. It therefore violated TSCA's reporting requirements, even if it did not violate any restrictions on importing the substances themselves. Whether the materials in the shipments themselves violated TSCA's import

restriction is irrelevant in this proceeding. The penalty is not imposed to redress a particular injury but to ensure self-monitoring among importers. EPA's interpretation of its statutory power to enforce TSCA, though broad, is not unreasonable.

VII.

Finally, ALM asserts that it should have been given a chance to cure its TSCA violations by submitting the certifications after EPA notified it of its violations. ALM has presented no authority to support that argument. Furthermore, such a right to rectify would defeat the self-enforcement purpose of the certification requirement by allowing importers to ignore the certification requirements and, if discovered, belatedly submit certification without penalty for their initial violation. This would be likely to encourage non-compliance. ALM cannot succeed on this ground.

VIII.

For these reasons, we will deny ALM's petition for review of the EPA's order. An appropriate order will be entered.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3785

ALM CORPORATION,

*Petitioner,*

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II,

*Respondent.*

Appeal from the Decision of the Environmental Protection Agency

Present:

Becker, Hutchinson and Alito,

*Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Environmental Protection Agency and was argued by counsel June 25, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review is hereby denied. Costs taxed against petitioner. All of the above in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS
Clerk

Dated: September 2, 1992

Certififed as a true copy and issued in lieu of a formal mandate on September 24, 1992.

Attest: Sally Mrvos.

Clerk, U.S. Court of Appeals for the Third Circuit.

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

TSCA Appeal No. 90-4

In the Matter of:

ALM Corporation,

*Respondent.*

Docket No. II
TSCA-IMP 13-86-0121

## FINAL DECISION

ALM Corporation (respondent) appeals from an Initial Decision assessing total civil penalties of $19,500 for nine violations of a regulation that requires importers of chemical substances to certify that the substances either comply with or are not subject to the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* The regulation, 19 C.F.R. § 12.121(a), was issued by the U.S. Customs Service pursuant to TSCA section 13, 15 U.S.C. § 2612. For the reasons stated below, I am affirming the presiding officer's decision and assessing civil penalties of $19,500.

*Statutory Background.* TSCA regulates chemical substances "that may present an unreasonable risk of injury to health or

the environment" and designates the EPA administrator to implement its requirements. 15 U.S.C. § 2601. TSCA section 16, 15 U.S.C. § 2615, authorizes the Administrator to assess civil penalties for a wide range of statutory violations that are set forth at TSCA section 15, 15 U.S.C. § 2614. Among other things, section 15(3)(B) makes it unlawful for any person to "fail or refuse to * * * submit reports, notices, or other information * * * as required by [TSCA] or a rule thereunder * * *."

TSCA also confers regulatory authority on the U.S. Treasury Department. TSCA section 13 requires the Secretary of the Treasury to refuse entry into the United States of chemical substances that do not comply with TSCA; and to issue implementing regulations "after consultation with the [EPA] Administrator * * *." Pursuant to section 13(b), the Customs Service, a part of the Treasury Department, has issued a regulation requiring importers of chemical substances to certify at the port of entry that such substances are either in compliance with TSCA or are not subject to TSCA. *See* 19 C.F.R. § 12.121(a).[1] The Customs Service has also issued a regulation stating that if the required certification statement is not furnished, the Customs Service shall detain the shipment and notify EPA and the importer of the violation. 19 C.F.R. § 12.122(b)(3).

*Factual Background.* Respondent imports Nylon and Delrin pellets that are considered "chemical substances" within the meaning of TSCA section 3, 15 U.S.C. § 2602. Respondent imported seven shipments of pellets between January and May 1986 that were not accompanied by certification statements. Stipulation of Facts No. 2 (March 3, 1987). On June 23, 1986, Region 2 filed a complaint charging respondent with two violations of TSCA section 13 and 19 C.F.R. § 12.121(a), based on two of the seven shipments, specifically those received on January 7 and 13, 1986. In August 1986, subsequent to the filing

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1 Section 12.121(a) states that:

> The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA * * *.

of the complaint, respondent incorrectly certified two additional shipments as not subject to TSCA. *Id.* Region 2 filed an amended complaint on March 4, 1987, charging respondent with nine violations of TSCA section 13 and 19 C.F.R. § 12.121(a), based on the seven shipments that lacked certification statements and the two shipments with incorrect certifications. All nine shipments contained materials that otherwise complied with TSCA. Stipulation of Facts No. 4. Region 2 proposed a civil penalty of $6,000 for each shipment (totalling $54,000). The Customs Service never detained any of the merchandise or asked for the missing certification statements.

The presiding officer issued an Opinion and Order Denying Motion to Dismiss and Granting Partial "Accelerated Decision" (hereinafter Accelerated Decision) on November 30, 1989. She held that: (1) respondent had imported chemical substances for which it was required to provide certification statements under 19 C.F.R. §12.121(a); (2) respondent's failure to furnish the certification statements and its submission of incorrect certification statements are both violations of 19 C.F.R. §12.121(a), and consequently are both prohibited acts under TSCA section 15(3)(B);[2] and therefore, (3) EPA may assess civil penalties for the violations pursuant to TSCA section 16, which authorizes EPA to assess civil penalties for acts that are prohibited acts under TSCA section 15(a)(B).

After a May 2, 1980 hearing on the sole issue of the penalty amount, the presiding officer issued an Initial Decision on September 7, 1990, reducing the proposed penalities to $19,500. Respondent appealed on October 1, 1990. By letter of November 2, 1990, respondent requested oral argument on the appeal. The Region filed an opposition to the request on November 14, 1990.

*Discussion.* On appeal, respondent does not challenge the presiding officer's findings that it failed to furnish certification statements required by section 12.121(a) and submitted incorrect certification statements. Rather, respondent argues that its noncompliance with section 12.121(a) has not yet "ripened into

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1 *See supra* at 1.

violations" of that regulation. Respondent further contends that even if it has violated section 12.121(a), any such violations are not prohibited acts under TSCA section 15. Therefore, it maintains, that since EPA may also assess civil penalties under section 16 for acts that are prohibited under section 15, EPA lacks authority to assess civil penalties for the violations. Additionally, respondent argues that EPA may not enforce section 12.121(a) because Congress conferred sole authority on the customs Service to enforce regulations issued under TSCA section 13. Respondent's first argument is rejected. Respondent claims that EPA's assessment of penalties based on its failure to comply with section 12.121(a) is premature because the Customs Service neither detained its merchandise pending compliance nor demanded redelivery, in accordance with 19 C.F.R. § 12.123. Respondent's Appeal Brief at 6-7. It argues that it was thereby deprived of the opportunity to cure its omissions and that EPA may not assess penalties unless it has been afforded that opportunity. This argument is without merit. As an importer, respondent's violations occurred when it received shipments that lacked accurate important certifications. EPA's authority under TSCA section 16 to assess civil penalties for the violations is unaffected by the additional authority given the Customs Service under TSCA section 13 to detain noncomplying shipments.

Respondent's other two arguments are also rejected. Respondent made both arguments to the presiding officer and she rejected them. I agree with the presiding officer's reasoning and with her conclusion that EPA may assess civil penalties for a section 12.121(a) violation, and therefore I adopt the reasoning and holding of the Accelerated Decision (*see supra* at 3) without further elaboration.

The remainder of this decision addresses respondent's argument that even if it is subject to civil penalties under TSCA, the amount assessed by the presiding officer was excessive and should not have exceeded $200 per violation. For the reasons stated below, I am rejecting respondent's arguments for reducing the penalties.

TSCA section 16(b) provides that, in determining an appropriate civil penalty, the Agency shall take into account the nature, circumstances, extent and gravity of the violation; the violator's ability to pay, ability to continue in business, history of prior such violations and degree of culpability; and "such other matters as justice may require." These factors are restated and elaborated upon in the Agency's Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act, 45 Fed. Reg. 59770 (September 10, 1980) (Guidelines). The Guidelines contain a matrix for selecting a gravity-based penalty in which the vertical axis of the matrix represents the circumstances of the violation (probability of harm) and the horizontal axis represents the extent of potential damage from the violation.[3] 45 Fed. Reg. at 59777. The gravity-based penalty is determined by the dollar figure indicated at the point where the axes intersect. The gravity-based penalty may then be adjusted upward or downward based on other specified factors.

The Guidelines have been supplemented by enforcement policy statements that explain how the two variables on the matrix should be applied to particular statutory and regulatory violations. *See* 45 Fed. Reg. 59770, 59771. An Enforcement Response Policy for Recordkeeping and Reporting Rules, TSCA Sections 8, 12 and 13 (July 12, 1984) (unpublished) (hereinafter cited as the "1984 Policy") explains how the variables should be applied to violations of TSCA section 13, including the import certification requirement. Complainant's Exhibit 6. The 1984 Policy was first modified by the Interim Final Amendments to the Enforcement Response Policy for TSCA Section 13 in May 1986 (hereinafter cited as the "1986 Interim Policy") which was superseded by the Final Enforcement Response Policy for TSCA Sections 8, 12 and 13 in June 1987 (hereinafter cited as the "Final Policy") (both unpublished).

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3 There are six penalty levels on the vertical axis. Violations are classified as high range (1 and 2), mid range (3 and 4) or low range (5 and 6). There are three penalty levels on the horizontal axis: major, significant or minor.

Neither the Guidelines nor the unpublished policy statements are binding on this tribunal. *See In the Matter of Empire Ace Insulation Manufacturing Corp.*, TSCA Appeal No. 86-4 n.1 at 2 (June 28, 1990). However, these documents facilitate the application of the statutory penalty factors to individual cases in a systematic fashion, and thus provide a sound framework for the exercise of an appellate tribunal's discretion. *Id. See also In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7 (February 27, 1987); *In the Matter of A.Y. McDonald Industries, Inc.*, RCRA (3008) Appeal No. 86-2 at 19 (July 23, 1987). As explained below, the penalties calculated by the presiding officer are consistent with the Guidelines and policy statements.

According to the Chief of Region 2's Toxic Substances Section,[4] Region 2 proposed a gravity-based penalty of $6,000 for each violation based on the Guidelines and the then-effective Interim Policy. The Guidelines prescribe a $6,000 penalty for a violation classified as "mid range level 4" on the "circumstances (probability of harm)" axis and as "significant" on the "extent of potential damage" axis (*see supra* n.3 at 6).[5] The Interim Policy classifies both the failure to submit an import certification and the submission of a false certification as "significant mid-range level 4 violations," provided that the chemical is otherwise in compliance with TSCA. Interim Policy at 3.[6] The Region recommended no adjustments in the gravity-based penalties derived from the matrix.

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4 Testimony of Daniel Kraft, Chief, Toxic Substances Section, Pesticides and Toxic Substances Branch, Region 2. Tr. 38.

5 The Interim and Final Policies both provide that EPA will not assess a civil penalty for the first violation but will issue a Notice of Non-Compliance. Region 2 issued such a Notice of Non-Compliance to respondent on November 28, 1985. Exhibit No. 5.

6 The Agency explains in the Final Policy that:

> Even if no actual harm occurs * * * [f]ailure to certify or filing a false certification * * * circumvents the purpose of TSCA § 13 and could lead to the importation of chemicals which violate other provisions of TSCA.

Final Policy at 20. Although the Final Policy was issued after the complaint, the Region relied on similar reasoning in its testimony at the hearing. *See, e.g.*, Tr. 59.

The presiding officer agreed with the Region's calculation of a gravity-based penalty of $6,000 for each of the nine violations.[7] However, she reduced the proposed penalty for each of the nine shipments to $2,500 "in the interests of justice," based on testimony that respondent's president did not receive EPA's notice of non-compliance. Initial Decision at 8. She further reduced the proposed penalty for each of the two shipments that bore incorrect certifications from $2,500 to $1,000 "in the interests of justice," based on testimony that respondent had been told by an unidentified EPA employee during a telephone conversation that the shipments were not subject to TSCA.[8]

Respondent argues that the presiding officer should have reduced the penalties even further than she did. It claims that she violated her duty under 40 C.F.R. § 22.27(b) to "consider any Guidelines issued under the Act" when she relied on the Interim Policy, which was not published and therefore, was not "issued under the Act,"[9] as a basis for selecting gravity-base penalties of $6,000 for the violations. Since the published Guidelines do not specifically address the gravity of section 13 violations, respondent argues that the presiding officer had a responsibility to make an independent determination as to their gravity and "abandoned" that responsibility when she accepted the classification of the violations as "significant mid range level 4" violations in the unpublished Interim Policy. Respondent maintains that if the presiding officer had independently evaluated the gravity of the violations, she would properly have classified them as "minor low-range 6 offenses," and calculated gravity-based penalties of $200 for each of them. Respon-

7 The presiding officer erroneously stated that she was applying the 1984 Policy when in fact she applied the Interim Policy. Initial Decision n. 3 and 4. However, her error was harmless, since it does not appear to have misled either party.

8 Consistent with the statute, the Guidelines provide for adjustments to the gravity-based penalty on a case-by-case basis, based on "other factors at [sic] justice may require." 45 Fed. Reg. at 59775.

9 Guidance documents that have not been issued in accordance with regulatory rulemaking procedures are not ordinarily considered to have been "issued under the Act." *See. e.g.*, In the Matter of Wyoming Refining Company, RCRA (3008) Appeal No. 84-2-at 7, 10 (May 30, 1986).

dent argues that there was no potential for harm from the violations because, apart from the missing or false certifications, its merchandise was in compliance with TSCA. Respondent further argues that the presiding officer should have reduced the $200 gravity-based penalties based on mitigating factors.[10]

Respondent's arguments are rejected. Respondent has not shown that the presiding officer did not "consider" any Guidelines issued under the Act merely because, in addition to the published Guidelines, she also took the unpublished Interim Policy into account. The Interim Policy was intended to supplement the Guidelines and is not inconsistent with them.[11] The presiding officer has a duty [sic] is to explain the penalty and how it deviates, if at all, from the Guidelines. By citing and relying on the Interim Policy, the presiding officer can satisfy this duty since the Interim Policy provides a form of explanation for the penalty selected. Although not issued "under the Act," the Interim Policy serves as an "analytical model" or "shorthand" for expressing the rationale behind the presiding officer's decision. *In re Sandoz, Inc.*, RCRA (3008) Appeal No. 85-7 (February 27, 1987). Moreover, in this specific instance, the presiding officer did not accept the penalty classification in the Interim Policy without analysis. She stated that she "considered very carefully" respondent's contention that there was no potential harm from its violations, but that she was influenced by the Region's position that the absence of an accurate

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10 According to respondent, the presiding officer derived penalties of $2,500 for the missing certifications and $1,000 for the false certifications by reducing the $6,000 gravity-based penalties by 41.6% and 33.3%, respectively, based on mitigating circumstances. Respondent argues that the presiding officer should reduce the $200 gravity-based penalties by the same percentages for mitigating circumstances and assess civil penalties of $80 and $35, respectively, for the violations. Respondent's Brief on Appeal at 8.

11 The Guidelines expressly state that:

> This document sets forth a general penalty assessment policy which will be supplemented by regulation-specific penalty assessment guidance. Together, these documents provide internal procedural guidance to aid EPA personnel to assess appropriate penalties.

45 Fed. Reg. at 59770.

certification deprived the Agency of "assurance that the importer is fulfilling their [sic] responsibility to determine that the chemicals are in compliance." Initial Decision at 5.

*Conclusion*. For the reasons stated, the decision is affirmed.[12] Respondent's request for oral argument is denied.

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12 In its response to the appeal, the Region argues that the presiding officer erred when she relied on particular mitigating factors to reduce the gravity-based penalties. Complainant's Appeal Reply Brief at 25 *et seq*. It requests that its proposed penalties of $6,000 per violation be reinstated. *Id*. at 28. Alternatively, it argues that the proposed penalties be increased to $26,500.

The Region did not present its arguments supporting an increase in the presiding officer's recommended penalties by a timely appeal, and therefore these arguments will not be heard. "Considering an argument advanced for the first time in a reply brief * * * is not only unfair to an appellee * * * but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." McBride v. Merrell Dow and Pharmaceuticals, Inc., 800 F.2d 1208, 1211 (D.C. Cir. 1986). *See also* In the Matter of Bell & Howell Company, TSCA-V-C-033, 034, 035 (Dec. 2, 1983). In that case, the Region appealed a penalty assessment on the ground that the presiding officer had erroneously reduced its proposed penalty. Respondent argued that the presiding officer should have imposed no penalty at all in light of mitigating factors. The Final Decision states that since respondent did not appeal the Initial Decision, his argument would not be heard, stating that "this decision, only addresses matters falling within the scope of [the Region's] appeal." Bell & Howell, *supra*, at 1.

## ORDER

Respondent shall pay civil penalties of $19,500. Payment must be made within 60 days after receipt of this Order by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

EPA—Region 2
(Regional Hearing Clerk)
P.0. Box 360188M
Pittsburgh, PA 15251

So ordered.[13]

/s/ RONALD L. MCCALLUM
Ronald L. McCa!lum
Chief Judicial Officer

13 The Chief Judicial Officer, as the Administrator's delegatee, has the authority to issue final orders in proceedings on appeal under 40 C.F.R. § 22.04. This decision was prepared with the assistance of Alice P. Wegman, Assistant Judicial Officer.

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Docket No. II
TSCA-IMP 13-86-0121

In the Matter of:

ALM Corporation,

*Respondent.*

*Toxic Substances Control Act* (TSCA), 15 U.S.C. §§ 2614 and 2615. In this action for violations of 19 C.F.R. § 12.121(a), a U. S. Customs regulation which implements § 13 of TSCA, 15 U.S.C. § 2612, wherein the Treasury Secretary is required to refuse entry into the customs territory of the United States to any chemical substance which fails to comply with TSCA and regulations issued pursuant thereto, a civil penalty of $19,500 was found to be appropriate.

TERRY SULLIVAN, Esquire, Office of Regional Counsel, Region II, United States Environmental Protection Agency, 26 Federal Plaza, New York, New York 10278, *for complainant.*

JAMES A. GERAGHTY, Esquire, Donohue and Donohue, 26 Broadway, New York, New York 10004, *for respondent.*

Before:

J. F. Greene, Administrative Law Judge

## DECISION AND ORDER

This matter arises under §§ 15 and 16 of the Toxic Substances Control Act (TSCA, or "the Act"), 15 U.S.C. §§ 2614 and 2615, which provide for the assessment of civil penalties for violations of the Act and regulations issued pursuant to authority contained therein.

The complaint charged respondent with failing to provide to the United States Customs Service ("Customs"), in violation of 19 C.F.R. §12.121(a), certification that seven shipments of certain materials into the United States were "subject to TSCA and complied with all applicable rules and orders thereunder;" and with falsely certifying that two shipments were not subject to the Act, also in violation of 19 C.F.R. § 12.121(a). This section, promulgated by the U. S. Treasury Department's Customs Service, implements §13 of TSCA, 15 U.S.C. § 2612, which requires the Secretary of the Treasury to refuse entry into the customs territory of the United States to "any chemical substance, mixture, or article containing a chemical substance or mixture" that fails to comply with TSCA and regulations in effect under TSCA. By way of implementation, 19 CFR § 12.121(a) provides that an importer of a "chemical substance in bulk or part of a mixture" must certify to Customs either that each shipment of such a substance complies with TSCA, or that the shipment is not subject to TSCA. Therefore, in order to be in compliance with TSCA, every shipment of a "chemical substance imported in bulk or as part of a mixture" must carry certification that it complies with TSCA, or, alternatively, must carry certification that the shipment is not subject to TSCA.

Respondent moved to dismiss on the following grounds:

1. 19 CFR § 12.121(a) was promulgated by Customs, and can be enforced only by Customs.

2. Sanctions for failure to comply with 19 CFR § 12.121(a) are limited to those set forth in § 13 of TSCA, 15 U.S.C. § 2612, *i. e.* refusal of entry of the goods, and provisions for charging the bond of the importer under certain circumstances;

3. The materials imported were not "chemical substances" within the meaning of § 3 of the Act, 15 U.S.C. §2602, but are "articles" not subject to import certification requirements under 19 CFR § 12.121(a) at the time the complaint issued.

Complainant moved for judgment in its favor as to all issues except penalty. By *Opinion and Order Denying Motion to Dismiss and Granting Partial "Accellerated* [sic] *Decision"* of November 30, 1989, it was held that 19 CFR § 12.121(a) could be enforced by U.S. EPA; that penalties provided at §§ 15-16 of TSCA, 15 U.S.C. § 2614-2615 may be assessed for violations of 19 CFR § 12.121(a), and that the materials imported are "chemical substances" within the meaning of § 3 of TSCA. It was also held that complainant was entitled to judgment as to all issues except penalty.

Thereafter, the penalty issue could not be settled by the parties, and went to hearing on May 2, 1990. Complainant seeks a civil penalty in the amount of $6000 for each of the nine violations charged in the complaint and determined in the November 30, 1989, Order to have been established.[1]

In these proceedings, the amount of any civil penalty to be assessed must be determined in accordance with criteria relating to civil penalties that are set forth in the Act;[2] further, rel-

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1 *Opinion and Order Denying Motion to Dismiss and Granting Partial "Accellerated* [sic] *Decision,"* November 30, 1989, 16-17, at ¶ 8.

2 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) provides as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

evant civil penalty guidelines issued pursuant to the Act must be considered, 40 CFR § 22.27(b).

The record discloses that complainant proposed a penalty in accordance with U. S. EPA guidelines then applicable. The proposal is consistent with current guidelines.[3]

Respondent argues that the penalty must be reduced because Customs did not detain the shipments which carried no certification. Further, respondent contends, U. S. EPA knew this and did nothing to change the situation. This "contributory negligence" theory, as respondent calls it [TR 98] must be rejected as having no application to these proceedings. While the theory has superficial appeal, TSCA provides strict liability for violations of § 13.

Respondent argues further that, because the shipments consisted of materials that are not toxic, are on U.S. EPA's "inventory," and could have been certified accurately as being in compliance with TSCA, the potential for harm is nonexistent. Therefore, the penalty should be greatly reduced. This argument is appealing, and has been considered very carefully. However, it must be held that the applicable penalty policy does not take toxicity into account, [CX 7, TR 62] inasmuch as it is U. S. EPA's position that the "harm is really for a failure to certify violation of section 13, or any improper certification or false certification is that the agency is not provided with the assurance that the importer is fulfilling their responsibility to determine that the chemicals are in compliance." [TR 67] Further,

> We have a more difficult job as an agency in monitoring compliance with imported chemicals than . . . [those] that are manufactured domestically. For a domestically manufactured chemical we can go to the company . . . review their records of production and make an independent determination whether or not the actual chemicals are

3 U. S. EPA issued guidelines in September, 1980, for the assessment of civil penalties under § 16 of the Act, TR 29-30, and, on July 12, 1984, a penalty policy developed for § 13 violations was issued. It is this version that applies to this action. Later, on May 15, 1987, a final enforcement response policy for § 13 violations was issued.

> or are not in compliance because we can look at the specific ingredients in the reactions.
>
> For an imported chemical, we really don't have that ability. The products are made out side the country, they're imported usually under a trade name and we really have no idea whether or not they're in compliance . . . and that's the reason behind the requirement for certification on the part of the importer, to acknowledge, provide notice . . . that they have investigated the chemicals that they are importing and have, in fact, determined that they're in compliance with TSCA.[4]

The question of whether the penalty policy ought to address the question of toxicity is an interesting one, but need not be reached here because of a determination that the interests of justice require reduction of the penalty for other reasons.

The penalty policy provides for a notice of noncompliance for a first violation. Such a notice was issued in this case, apparently on November 26, 1985. [TR 36, 85, CX 5]. However, respondent's president testified credibly that he never saw the notice, and does not know what happened to it. A return receipt was signed by a guard at the gate at the facility in which respondent is located, but there are six or seven different corporations located at the facility other than respondent.[5] Under these circumstances, it is unfair to apply the full amount of the penalty provided in the penalty policy. Respondent's testimony is found credible particularly since there was little to gain, in view of the fact that the shipments consisted of material that is on the "inventory," by not providing certification. The amount to be assessed for each charge of the complaint, therefore, will be reduced to $2500, and it is found that this amount is appropriate under the circumstances of this case.

With respect to the certification that TSCA did not apply to two shipments, respondent's president testified that, after

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4 TR 67-68.

5 TR 86-87. Respondent pays a part of the guard's salary.

receiving the complaint herein, he telephoned U. S. EPA to inquire about the matter. He was informed by the office to which he was ultimately referred that if the material was not toxic, he could say that the shipments are not subject to TSCA. [TR 88-89]. Following this advice, two shipments were certified as not subject to TSCA. His testimony is credible, particularly since the "false" certifications (that the shipments were not subject to TSCA) did in fact occur following the issuance of the complaint. This testimony will be relied upon in further lowering the penalty for violations in connection with the two shipments which were so certified. It must be understood, however, that inaccurate advice received from someone at U. S. EPA, possibly an outside contractor, does not excuse violations of TSCA. In the particular circumstances of this case, and with respect to these two counts only, this occurrence serves to reduce the fine to $1000 each. Accordingly, it is found that respondent's testimony is credible and constitutes a basis for a reduction of penalties sought, in the interests of justice.

## ORDER

A civil penalty in the amount of $19,500 is hereby assessed against respondent ALM Corporation for the violations of the Act and regulations found in the *Opinion and Order Denying Motion To Dismiss and Granting Partial "Accellerated* [sic] *Decision*" of November 30, 1989, a copy of which is attached hereto and made a part hereof, for the reasons stated herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of this order upon respondent unless. Payment shall be made by forwarding a cashier's check or certified check payable to "Treasurer of the United States" to the United States Environmental Protection Agency, Region II, Post Office Box 360188M, Pittsburgh, Pennsylvania 15251. A copy of the transmittal of payment should be sent to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 11, 26 Federal Plaza, New York, New York 10278.

/s/ J. F. GREENE
J. F. Greene
Administrative Law Judge

August 30, 1990
Washington, D.C.

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Docket No. II
TSCA-IMP 13-86-0121

Judge Greene

In the Matter of:

ALM Corporation,

*Respondent.*

OPINION AND ORDER DENYING MOTION TO DISMISS AND GRANTING PARTIAL "ACCELLERATED [SIC] DECISION"

This matter arises under §§ 15 and 16 of the Toxic Substances Control Act, (TSCA, or "the Act"), 15 U.S.C. §§ 2614 and 2615, which provide for the assessment of civil penalties for violations of the Act and regulations issued pursuant to authority contained therein.

The complaint charges respondent with failing to provide to the United States Customs Service ("Customs"), in violation of 19 CFR § 12.121(a), certification that seven shipments of certain materials into the United States were "subject to TSCA and complied with all applicable rules and orders thereunder;" and with falsely certifying that two shipments were not subject to the Act, also in violation of 19 C.F.R. § 12.121(a). Promulgated by the U. S. Treasury Department's Customs Service, 19 C.F.R. § 12.121(a) implements § 13 of TSCA, 15 U.S.C. § 2612, which requires the Treasury Secretary to refuse entry into the customs territory of the United States to "any chemi-

cal substance, mixture, or article containing a chemical substance or mixture" that fails to comply with TSCA and regulations in effect under TSCA. By way of implementation, 19 CFR § 12.121(a) provides that an importer of a "chemical substance in bulk or part of a mixture" must certify to Customs either that each shipment of such a substance complies with TSCA and all applicable rules and orders issued pursuant to TSCA, or that the shipment is not subject to TSCA. In order to comply with § 12.121(a), therefore, every shipment of a "chemical substance imported in bulk or as part of a mixture" must carry certification as to compliance with TSCA and effective regulations, or certification that TSCA does not apply to the shipment.[1]

Respondent moved to dismiss on several grounds, including: (1) Since 19 CFR § 12.121(a) was promulgated by Customs, it can be enforced only by Customs—not by the United States Environmental Protection Agency (EPA); (2) sanctions for failure to comply with 19 CFR § 12.121(a) (assuming the failure is detected by Customs at the time the goods are offered for entry) are limited to those set out in § 13 of TSCA, 15 U.S.C. § 2612, i. e. refusal of entry of the goods, and provisions for

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1 19 CFR § 12.121(a) provides, in pertinent part, that:

*Reporting requirements.* (a) All chemical substances in bulk or mixtures. The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA. The importer, or his authorized agent, shall sign one of the following statements:

> I certify that all chemical sub stances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.
>
> I certify that all chemicals in this shipment are not subject to TSCA.

The certification, which shall be filed with the district director at the port of entry before release of the shipment, may appear as a typed or stamped statement . . . (0)n an appropriate entry document or commercial invoice . . . .

charging the bond of the importer under certain circumstances;[2] and; (3) that the materials imported here were not "chemical substances" within the meaning of § 3 of the Act, 15 U.S.C. § 2602, but are "articles" not subject to import certification requirements under 19 CFR §12.121(a) at the time the complaint issued.

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2 15 U.S.C. § 2612, *Entry into customs territory of the United States*, provides, in pertinent part that:

> (a) In general.—(1) The Secretary of the Treasury shall refuse entry into the customs territory of the United States . . . of any chemical substance, mixture, or article containing a chemical substance or mixture offered for such entry if—
>
> (A) it fails to comply with any rule in effect under this chapter, or
>
> (B) it is offered for entry in violation of section 2604 and 2605 of this title, a rule or order under section 2604 or 2605 of this title, or an order issued in a civil action brought under section 2604 or 2605 of this title.
>
> (2) If a chemical substance, mixture, or article is refused entry under paragraph (1), the Secretary of the Treasury shall notify the consignee of such entry refusal, shall cause its disposal or storage (under such rules as the Secretary of the Treasury may prescribe) if it has not been exported by the consignee within 90 days from the date of receipt of notice of such refusal, except that the Secretary . . . may, pending a review by the Administrator of the entry refusal, release to the consignee such substance, mixture, or article on execution of bond for the amount of the full invoice of such substance, mixture, or article (as such value is set forth in the customs entry), together with the duty thereon. On failure to return such substance, mixture, or article for any cause to the custody of the Secretary of the Treasury when demanded, such consignee shall be liable to the United States for liquidated damages equal to the full amount of such bond. All charges for storage, cartage, and labor on and for disposal of substances, mixtures, or articles which are refused entry or release under this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future entry made by such owner or consignee.
>
> (b) Rules.—The Secretary of the Treasury, after consultation with the Administrator, shall issue rules for the administration of subsection (a) of this section.

Complainant opposed the motion to dismiss, and cross-moved for "accelerated decision" as to all issues except penalty.

Taking first respondent's argument that EPA may not seek civil penalties for violations of 19 CFR § 12.121(a) because it is a Customs regulation, an examination of pertinent provisions of the Act reveals the following:

1. Section 2 of TSCA, 15 U.S.C. § 2601, *Findings, Policy and Intent*, declares at subsection (c) that "(I)t is the intent of Congress that the Administrator [of EPA] shall carry out this chapter [TSCA] in a reasonable and prudent manner. . . ." This language and other provisions throughout the Act make clear that Congress intended the Administrator of the EPA to administer TSCA, even if certain other officials are directed to carry out limited functions in aid of TSCA's regulatory design, and that it is the Administrator who has enforcement authority in connection with violations of TSCA provisions.

2. Section 13 of TSCA, 15 U.S.C. § 2612, provides that the Secretary of the Treasury shall refuse entry into the customs territory of the United States to any chemical substance if offered for entry in violation of certain sections of TSCA or if a shipment "fails to comply with any rule in effect under this chapter." Section 13 further directs the Treasury Secretary to issue rules to implement the refusal of entry provisions of § 13, after consultation with the EPA Administrator.

3. 19 CFR § 12.121(a), which requires certification for the importation of chemical substances, was issued by Customs pursuant to the direction of Section 13 of TSCA, in consultation with the EPA Administrator, and is therefore a "rule in effect under this chapter."[3] It requires information (in the form of certification) as to whether the shipment to which the certification is attached complies with TSCA, or is not subject to TSCA.

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3 Section 13 of TSCA, 15 U.S.C. § 2612(a)(1)(A). The words "this Chapter" refer to Chapter 53 of the United States Code, *Control of Toxic Substances*.

4. Section 15 of TSCA, 15 U.S.C. § 2614, provides that "it shall be unlawful for any person" to "fail or refuse to submit *reports*, notices or other *information* . . . as required by this Chapter or a rule thereunder". (Emphasis supplied). It is noted that the caption to 19 CFR § 12.121(a), a rule issued under "this Chapter," consists of the words "*Reporting requirements*".[4]

5. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), provides that "(A)ny person who violates a provision of section 2614 [15 U.S.C. § 2614, Section 15 of TSCA] of this title shall be liable to the United States for a civil penalty . . . (A) civil penalty for a violation of section 2614 of this title shall be assessed by the Administrator . . . .".

These provisions leave no doubt that the Administrator has authority to impose civil penalties for violations of rules issued pursuant to the Act—as 19 CFR § 12.121(a) was. The failure or refusal "to submit reports . . . or other information as required by this Chapter or a rule thereunder" is a "prohibited act" under § 15(3)(B) of TSCA, 15 U.S.C. § 2614(3)(B), for which civil penalties are to be assessed pursuant to § 16 of TSCA (15 U.S.C. § 2615) by the Administrator. Where, as here, the specific information or report required is a condition of entry of goods into the country, failing which entry shall be refused, it is Customs officials who are equipped to refuse entry. But it is EPA which has specific authority to assess penalties for the failure to provide information or reports required by a TSCA rule. In short, the violation of a TSCA rule, whether the rule was promulgated by EPA or by Customs, constitutes a violation of § 15(3)(B) of TSCA, for which EPA "shall"[5] assess civil penalties.

Turning to respondent's argument that the penalties for failure to comply with 19 CFR 12.121(a) are limited to those set forth in § 13 of TSCA (i. e. refusal of entry and certain bond charging provisions, see note 2, page 4, *supra*), a reading of

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4 See note 1, *supra* page 3.

5 Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

§ 13 (15 U.S.C. § 2612) makes clear that refusal of entry for uncertified goods is not a penalty, although it may seem so to importers. Rather, it is an expression of public policy that unknown (uncertified or falsely certified) chemical substances may not enter the United States. Refusal of entry specifically furthers the regulatory schema set out in TSCA for the control of toxic substances and the protection of human health in the United States. The bond charging provisions of § 13 relate to the administration and handling of goods which are refused entry. For instance, the bond is charged if the Treasury Secretary decides to release a detained shipment to the consignee while EPA is reviewing the refusal of entry.[6] In another provision, the bond would be charged if a consignee fails to return the goods to the Secretary upon demand, following the Administrator's determination that such goods may not enter.[7] Bond charging in this instance might be considered a penalty for failure to surrender the goods, but not for failure to certify compliance with TSCA. These provisions are ministerial in nature, and, as set out at § 13 of TSCA, assure that the United States will not bear expense in connection with items that have been refused entry. The absence in § 13 of a specific penalty for violation of § 13 merely conforms to the structure of TSCA and many other statutes in which civil penalty provisions are set out elsewhere in the statute. In TSCA, the civil penalty provisions are set forth at §§ 15-16, 15 U.S.C. §§ 2614-2615. Conversely, the presence in § 13 of entry refusal and bond charging provisions, even if these are considered penalties, does not preclude the assessment of civil penalties authorized in §§ 15-16 of TSCA, if civil penalties are clearly assessable for violations of regulations issued pursuant to § 13. Here, it is clear that §§ 15-16 penalties can be assessed for failure or refusal to sub-

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6 See generally 19 CFR § 12.122(b)(1), (c), and (d); and 19 CFR § 12.123(a), (b), and (c). Customs "shall give prompt notice" to the Administrator upon detaining shipments under TSCA. The Administrator then will review the detention and notify Customs within 30 days notify Customs whether to permit or refuse entry.

7 15 U.S.C. § 2612(a)(2). See note 2, *supra*, page 4, for the text of this provision.

mit reports and other information required by TSCA regulations. Respondent's argument on this point, if it were to prevail, would have an interesting consequence: if Customs failed to note the absence of certification and permitted entry, and if TSCA §§ 15-16 civil penalties could not be assessed because sanctions were limited to the refusal of entry and bond charging provisions of § 13, there would be no penalty for violations of § 12.121(a) after the fact. And in the case of false certification (that the shipment was not subject to TSCA), which Customs might not be able to detect, again, in the absence of cival penalties there would be no sanctions as the goods would have already come in. Settled principles of statutory interpretation require avoidance of a result which runs counter to the broad goals which Congress intended to effectuate, in the absence of an unmistakable directive that is lacking here. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968), *National Petroleum Refiners Ass'n v. FTC*, 482 F. 2d 672, 689 (D. C. Cir. 1973). Application of the statutory construction *maxim expressio unius est exclusivo alterius*, urged by respondent, would create such a result.[8]

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8 *Expressio unius est exclusio alterius* is merely an auxiliary rule of construction, not a rule of law. It is applied only to assist in arriving at the real legislative intent, where such intent is not manifest. It may not be used to create an ambiguity, or to override clear expression of legislative intent. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981), *Neuberger* v. *Commisioner* [sic], 311 U.S. 83; *Springer* v. *Phillippine Islands*, 277 U.S. 189 *Robb* v. *Ramey Associates*, 14 A. 2d 394, 40 Del. 520; *Crancer* v. *Lowden* 121 F. 2d 645, *aff'd*, 315 U.S. 631. It should be applied with great caution, *U. S. v. Katz*, 78 F. Supp. 21. Further, the maxim is "increasingly considered unreliable in statutory construction," *National Petroleum Refiners Ass'n* v. *Federal Trade Commission*, 482 F.2d 672, 676 (D. C. Cir. 1973). See also *Carter* v. *Director, OWCP*, 751 F. 2d 1398, 1401 (D. C. Cir., 1985).

In this case, application of the maxim would require total disregard of the clear language of § 15(3)(B), 15 U.S.C. § 2614(3)(B),thereby creating an ambiguity where none existed, and would overlook straightforward legislative intent to provide penalties for failure or refusal to submit reports and other information pursuant to TSCA rules. Finally, *expressio unius est exclusio alterius* does not apply here because refusal of entry and bond charging provisions are not penalties for violations of the *reporting requirements* of 19 CFR

The third ground of respondent's motion to dismiss the complaint is that, in its view, the materials imported without certification (Counts 1-7 of the complaint) or with allegedly false certification (Counts 8 and 9 of the complaint)[9] are not "chemical substances" within the meaning of *15 U.S.C. § 2602, § 3* of TSCA; they are "articles." As such, they are not subject to the certification requirements pursuant to 19 CFR § 12.121(a).

Five of the seven shipments which carried no TSCA certification consisted of between 43,313 and 48,510 pounds of tiny (about three millimeters across) pellets referred to on the invoices as "nylon 6.6 chips 'polynil' P-50"; another shipment was 33,124 pounds of "Delrin 100," and still another consisted of "nylon 7460 K" and "Delrin 100/107," totalling 40,674 pounds. Two shipments certified as not subject to TSCA each consisted of about 94,200 pounds of "nylon 6.6 chips 'polynil' P-50".[10] According to respondent, the technical name for Delrin is polyacetal methelene thermoplastic polymer; its chemical formula is 0-CH20-CH2-0CH2; its Chemical Abstract Services (CAS) registry number is 66455-31-0.[11] It is used to make the water contact parts of plumbing equipment, and has been approved by the Food and Drug Administration for contact with food.[12] Nylon is a polyamide; its chemical formula is CONH.[12] Its CAS number is 32131-17-2. During the manufacturing process, the pellets are introduced into a feed hopper, then dropped into a chamber where they are heated. When the material becomes molten (at 172° to 184°C for Delrin and 490-510°F for nylon,[13]) it is forced into molds of the finished prod-

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9 Stipulation of Facts #3, attached and made a part hereof.

10 Complainant's Exhibits 3-a to 3-i, and 9.

11 A CAS registry number identifies chemical substances on the basis of their chemical structure. Affidavit of Nora Lopez, page 6.

12 Complainant's Exhibit 9, a letter dated August 25, 1986, from respondent's counsel to an EPA attorney.

13 Material Safety Data Sheet for Delrin Acetal Resin dated October, 1985, issued by DuPont (Polymer Products Department), Affidavit of Nora Lopez, Attachment 1. This document notes that containers of Delrin should be opened only in well-ventilated areas, and that formaldehyde is released "in small quantities during hot processing".

uct[14] and cooled. Both nylon and Delrin were listed on the TSCA Chemical Substances Inventory when the complaint herein was issued.[15]

TSCA does not define "*article*". *However*, Customs regulations at 19 CFR 12.120(a)(1) define "article" as:

> (1) . . . . a manufactured item which:
>
> (i) Is formed to a specific shape or design during manufacture,
>
> (ii) Has end use functions dependent in whole or in part upon its shape or design during end use, and
>
> (iii) Has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article . . . except that fluids and particles are not considered articles regardless of shape or design . . . .

The term "chemical substance" is defined in § 3 of TSCA, 15 U.S.C. § 2602, and at 40 CFR § 710.2(h) of the Chemical Substances Inventory reporting [(pursuant to § 8(b) of TSCA)] regulations as:

> "Chemical substance" means any organic or inorganic substance of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any chemical element or uncombined radical.
>
> . . .

The definition continues by listing exceptions, such as tobacco, pesticides, food, firearms, and other materials not relevant to a consideration of whether respondent's nylon and Delrin pellets are "articles" or "chemical substances". Complainant urges that respondent's pellets should be held to be "particles;" particles are explicitly excluded from the 19 CFR § 12.120(a)(1) definition of "article". Complainant further points out that

14 Respondent's motion to dismiss, page 9.

15 Affidavit of Nora Lopez, page 7; stipulation of facts #4.

EPA's interpretation of the term "article" has consistently included the idea of a "finished form" or "finished product". Under that analysis, the pellets cannot be articles because they are used in respondent's manufacturing process to make finished products; the parties have stipulated that Delrin and nylon are imported by respondent in bulk form, classified by respondent under the Tariff Schedule as "Item #408.6100, Thermoplastic resins: polyamide resins, nylon type" with the intent to manufacture them into finished products (Stipulations #7, #9).

It is held that respondent's pellets are "chemical substances" within the meaning of TSCA § 3 and 40 CFR 710.2(h), and that they are subject to the reporting requirements of 19 CFR § 12.121(a). The definition of "chemical substance" includes any "organic or inorganic substance of a particular molecular identity . . . ." Delrin and nylon are organic or inorganic substances having a particular identity. Respondent may be correct in noting that nearly everything falls within this broad definition. However, as long as there is no doubt that these particular materials fall within the definition, and since they are not among the listed exceptions, it must be held that they are "chemical substances."[16] Further, the definition of "article" as having ". . . end use functions dependent in whole or in part upon its shape or design during the end use . . . ," 19 CFR 12.120(a)(1), appears to exclude these pellets. In the shape in which they are imported, they do not really have end use functions that depend upon their specific shape, although apparently they must be quite small to be accommodated by the machinery into which they are fed for melting. Therefore, both because the pellets fall within the definition of "chemical substances," and because they are not "articles," they must be held to be "chemical substances."

Accordingly, respondent's motion to dismiss is denied.

Turning to complainant's motion for "accellerated decision" as to respondent's liability for violations alleged in the com-

16 Nylon and Delrin (CAS registry numbers) appear on the Toxic Substances Control Act Chemical Substances Inventory compiled by the Administrator pursuant to § 8(b) of TSCA, 15 U.S.C. 2607(b). See also Stipulation #4.

plaint, stipulations and documents provided by counsel in pre-trial exchange, which have been made part of the record, reveal that the facts have been agreed upon. It is concluded, based upon determinations made in connection with respondent's motion to dismiss and the record in this matter, that complainant's motion for accellerated [sic] decision as to liability should be granted.

*Findings of Fact and Conclusions of Law*

1. Respondent ALM Corporation operates a facility at 55 Haul Road, Wayne, New Jersey, for the manufacture and distribution of various types of plastic materials for use in the production of plastic articles, (Stipulation #1) and is subject to TSCA.

2. Respondent was the importer of record of the nylon 6.6 chips polynil P-50, Nylon 7460K, Delrin 100, and Delrin 100/107 materials in the shipments set out in Counts 1 through 9 of the amended complaint. (Stipulation #2, attached hereto and made a part hereof). These materials, shaped into small pellets (about three millimeters across) were imported in bulk and classified by respondent under the tariff schedule of the United States as Item #408.6100, thermoplastic resins: polyamide resins, nylon type.

3. The shipments listed in Counts 1 through 7 of the amended complaint were not accompanied by certification as required by 19 CFR § 12.121(a). (Stipulation #3) The shipments set out in Counts 8-9 of the amended complaint were accompanied by certifications that the merchandise was not subject to TSCA.

5. Nylon 6.6 chips polynil P-50, Delrin 100, Delrin 107, and Nylon 7460K are "chemical substances" within the meaning of § 3 of TSCA, not "articles" as defined at 19 CFR § 12.120(a)(1); as imported by respondent, they do not have end use functions dependent upon their shape or design during end use, which is one of the characteristics of an "article," 19 CFR § 12.120(a)(1)(ii).

6. EPA has authority to enforce § 13 of TSCA, 15 U.S.C. § 2614, and regulations issued pursuant thereto; 19 U.S.C. § 12.121 is a regulation issued pursuant to § 13 of TSCA. EPA has authority to assess civil penalties, pursuant to §§ 15-16 of TSCA, for violations of 19 CFR § 12.121(a).

7. Penalties provided at §§ 15-16 of TSCA, 15 U.S.C. § 2614-2615, are assessable for violations of 19 CFR § 12.121(a) despite the presence in § 13 of TSCA of refusal of entry and bond charging provisions.

8. In failing to provide certification as required by 19 CFR § 12.121 for nylon and Delrin materials, and in erroneously certifying that nylon materials (Counts 8 and 9 of the amended complaint were not subject to TSCA, respondent violated § 15 of TSCA, 15 U.S.C. § 2614, in that respondent failed to submit reports or other information as required by 19 CFR § 12.121, a regulation issued pursuant to § 13 of TSCA, and is liable for a civil penalty in an amount not to exceed $25,000 per violation in accordance with § 16 of TSCA, 15 U.S.C. § 2615.

Respondent's motion to dismiss is hereby denied. Complainant's motion for "accellerated [sic] decision" as to liability is hereby granted. Remaining to be determined in this matter is the amount of civil penalty, if any, to be assessed for the violations found.

It is ORDERED that the parties shall confer upon the possibility for settlement of this matter, and shall report upon their efforts during the week of January 22, 1990.

/s/ J. F. GREENE
J. F. Greene
Administrative Law Judge

November 30, 1989
Washington, D.C.